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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP LOZANO,

Defendant and Appellant.

B201001

(Los Angeles County
Super. Ct. No. LA044143)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Martin L. Herscovits, Judge. Affirmed.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason Tran
and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Phillip Lozano appeals the judgment entered following his conviction by jury of murder and first degree robbery. (Pen. Code, §§ 187, 211.) The trial court sentenced Lozano to a term of 19 years to life in state prison.

Lozano contends the trial court erroneously instructed the jury on a new theory of culpability after the jury indicated it was deadlocked and the trial court failed to permit defense counsel to present argument bearing on the new theory.

We reject these contentions and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The offenses.

On October 4, 2003, at 9:30 a.m., Lozano and codefendant Glenn Terrell arrived unannounced at the North Hollywood apartment of Enrique Briseno.¹ Briseno lived with his mother, Dora Amaya. Briseno considered Lozano a friend. Lozano had lived in Briseno's room in the apartment for a few months in 2002. Briseno had given Lozano marijuana but had never sold it to him. Briseno knew Terrell through Lozano and had seen him numerous times both alone and with Lozano. Briseno previously had bought and sold one pound quantities of marijuana worth approximately \$3,500 in deals with Terrell and they had "hung out" a few times.

Terrell and Lozano said they wanted to buy a pound of marijuana. Briseno had about two pounds of marijuana in the apartment. However, he was uneasy because Terrell had never previously arrived at the apartment unannounced. Briseno told them he did not have marijuana to sell but invited them inside to smoke marijuana. The three entered Briseno's bedroom and, while they were smoking marijuana, Terrell attacked Briseno. Terrell sprayed mace in Briseno's

¹ Terrell and Lozano were tried jointly with separate juries. This court affirmed Terrell's convictions of special circumstance murder and attempted willful, deliberate and premeditated murder in *People v. Terrell* (2008) WL 2764589. We take judicial notice of the record on appeal in that case.

face, broke his nose and repeatedly stabbed him with an ice pick, temporarily paralyzing him.

Briseno's mother, Amaya, who had been in her bedroom, came to the doorway of Briseno's room and yelled for the attack to stop. Briseno told Amaya to run. Terrell chased Amaya into the living room and Lozano followed. Briseno heard Terrell demanding money, then sounds of a struggle and his mother's screams. During the struggle, Briseno heard Lozano say, "Let's go already."

While the struggle in the living room continued, Lozano returned to Briseno's room and asked Briseno for money. Lozano told Briseno, "Give him something so it will stop." Lozano searched Briseno but failed to find \$250 in one of Briseno's pockets. However, Lozano took a three-ounce bag of marijuana valued at \$1,000 that was on the floor of Briseno's room and left.

When the sounds of the struggle stopped, Terrell reentered Briseno's room and slashed Briseno's throat.

A neighbor saw a male matching Terrell's description pull Amaya into the apartment and throw a metal object on the ground. The neighbor saw two males matching Lozano and Terrell's description leave the apartment.

Amaya was found face down with a carving fork protruding from her back and a piece of knife blade protruding from her head. A knife handle and a knife blade were found nearby. Amaya had been stabbed six times, four times with a knife and twice with a carving fork. One of the knife wounds punctured Amaya's lung and caused her death within 15-30 minutes.

Briseno was paralyzed for a week. When he left the hospital he could move only his arms. Four years after the attack, the use of his left arm is limited. Briseno showed the jury a 12-inch scar from his belly to his underarm and numerous puncture wounds. At the time of trial, a piece of the ice pick remained in Briseno's spine.

On the night of the attack, police officers arrested Lozano and Terrell at Terrell's Lancaster residence. A handgun and the three-ounce bag of marijuana Lozano had taken from Briseno's apartment were found in Terrell's bedroom.

2. Lozano's statement.

On October 5, 2003, at approximately 3:00 a.m., Los Angeles Police Detective Andres Alegria interviewed Lozano. A tape recording of the interview was played for the jury. Lozano initially blamed two other individuals for the crimes but later admitted he and Terrell had been alone. Lozano claimed Terrell planned to ask Briseno for a loan and, if he refused, rob him of marijuana which Terrell would sell. Lozano brought a pocket knife from Terrell's house and had it with him during the incident. Lozano also placed a gun in the trunk of the car before driving to Briseno's apartment. Lozano climbed over the gate surrounding the security complex and opened the gate for Terrell.

Lozano did not know why Terrell attacked Briseno but could not stop him. When Terrell attacked Amaya, Lozano yelled, "This isn't supposed to happen. I can't do this." Amaya tried to escape but Terrell pulled her inside the apartment. Lozano told Amaya to sit on the couch and she did. Lozano then went into Briseno's room to get the marijuana. Amaya had blood on her face and body at that time. In the bedroom, Briseno told Lozano, "I'm done, just go." Lozano told Briseno that, if he gave Terrell money or marijuana, Terrell would leave. Lozano asked Briseno for money but he said he only had the marijuana.

When Lozano returned from the bedroom, Terrell was stabbing Amaya on the couch. When Terrell's knife broke, he told Lozano, in a "demonic" voice, "get me something. I broke it." Lozano gave Terrell a carving fork from the kitchen counter, knowing Terrell was going to stab Amaya with it. Terrell then began to stab Amaya. Lozano took the marijuana and told Terrell, "I'm going . . . to the car." Terrell responded, "Don't leave." At the time, Amaya was still alive.

Lozano went to the car and put the marijuana in the trunk. After about thirty seconds, Terrell came out. Lozano drove to Terrell's home in Lancaster. Terrell apologized for snapping at Lozano and told Lozano he still loved him even though Lozano did not help him. Once they returned to the apartment, Terrell said Briseno and Amaya were dead. Terrell accused Lozano of stealing some of the marijuana. Lozano locked himself in Terrell's room with the gun and the marijuana.

3. Jury argument.

Lozano was charged with murder and attempted robbery of Amaya, and attempted murder and robbery of Briseno.

The prosecutor argued Lozano personally committed robbery and he aided and abetted Terrell's commission of the other offenses. The prosecutor asserted all the People had to prove, in addition to the commission of the robbery, was reckless indifference to human life and this had been shown by the act of giving Terrell the carving fork.

Defense counsel argued the evidence showed the murder occurred before Lozano handed Terrell the carving fork because Amaya already had received the knife injury that punctured her lung and caused her death. Defense counsel asserted, falsely, the jury instructions would indicate that murder occurs at the time the fatal injury is struck. Defense counsel further argued that if Lozano was not guilty of robbery, the felony-murder rule did not apply.

The prosecutor agreed with much of defense counsel's argument but insisted Lozano was guilty of robbery. The prosecutor emphasized the felony murder theory and stated that the case "rises and falls on whether or not [Lozano] committed that robbery."

4. Jury instructions.

The trial court instructed the jury, inter alia, on the elements of the offenses, the burden of proof, the felony-murder rule, aiding and abetting and on the difference between first and second degree murder.

5. Deliberations.

The jury commenced deliberations on the morning of May 7, 2007. Shortly thereafter, the jury requested clarification of the rule that if the defendant is guilty of robbery, it follows that he is guilty of murder or attempted murder. The trial court referred the jury to instructions it already had given.

The next day, the jury asked, “What are the conditions under which we can find [Lozano] guilty of second-degree murder?” The prosecutor asked the trial court to direct the jury’s attention to the second degree murder instructions. The prosecutor noted the People had argued for murder based on the felony-murder rule. Under that theory, a conviction of second degree murder was not possible. The prosecutor requested “about five minutes to reargue on this specific topic.” Defense counsel objected to reopening argument. The trial court concluded it was appropriate only to refer the jury to instructions previously given.

That afternoon, the jury wrote a note that stated, “We are not able to come to a unanimous decision on one of the counts. What is the next step?” Before the trial court could respond, the jury sent another note that asked, “if the only act of aiding and abetting was . . . handing the fork to the perpetrator and the victim had already suffered a fatal wound, is it still aiding and abetting the crime of murder?”

Before responding to these notes, the trial court took the verdicts the jury had reached on three counts. The jury found Lozano guilty of first-degree robbery of Briseno but not guilty of attempted murder of Briseno and attempted robbery of Amaya. When the bailiff collected the verdict forms, one juror stated, “I think if you could give us an answer to the other question . . . it might help.” Another juror interjected, “It might not.” The trial court asked if the jury meant by asking the second question that it was still “working” on that count. Juror No. 1 answered affirmatively.

After the jury returned to the jury room, the prosecutor noted several of Lozano's acts other than handing the fork to Terrell might have constituted aiding and abetting. Further, in light of the guilty verdict on the robbery count, it was difficult to discern what the jury was asking.

The trial court asked defense counsel's position. Defense counsel responded: "I would be against reopening of argument." Defense counsel stated the question indicated the jury had found the only act of aiding and abetting was the act of handing the fork to Terrell. It also appeared the jury had determined the fatal wound was struck before Lozano handed Terrell the fork. Defense counsel stated, "The real question is when, if at all, the intent to aid and abet was formed. If it was after the fatal blow was struck, after the murder was committed, he can't be guilty because the intent has to be at the time the crime is committed or before the crime was committed."

After a recess, the trial court indicated it intended to instruct the jury consistent with the holding of *People v. Celis* (2006) 141 Cal.App.4th 466, 473-474, which states: "In a simple murder case, i.e. not involving the felony murder rule, a person may aid and abet a murder after the fatal blow is struck as long as the aiding and abetting occurs before the victim dies."

Defense counsel objected but requested that if the trial court were to give the instruction, it should give the entire quotation, including the preamble phrase that provides, "In a simple murder case, i.e. not involving the felony murder rule." (*People v. Celis, supra*, 141 Cal.App.4th at pp. 473-474.) The prosecutor objected this preamble phrase would confuse the jury.

At 4:00 p.m., the trial court gave the instruction but omitted the preamble phrase. The trial court instructed the jury as follows: "A person may aid and abet a murder after the fatal blow is struck as long as the aiding and abetting occurs before the victim dies. This additional instruction should be used with the instructions . . . on aiding and abetting. The jury is the exclusive judge of the facts. In answering this question, the court does not express any view on the evidence."

The next morning, the jury found Lozano guilty of second degree murder of Amaya.

CONTENTIONS

Lozano contends the trial court erroneously instructed the jury on a new theory of culpability after the jury indicated it was deadlocked. Lozano further contends the trial court failed to permit defense counsel to present argument bearing on the new theory.

DISCUSSION

1. *The trial court did not instruct the jury on a new theory of culpability.*

Lozano contends the supplemental instructions introduced an entirely new legal principle on which the jury could rely to convict. Lozano claims the instruction effectively coerced a guilty verdict from the jury. Lozano relies on two cases, *People v. Stouter* (1904) 142 Cal. 146 and *People v. Jennings* (1972) 22 Cal.App.3d 945. However, neither is applicable here.

In *Stouter*, after the jury indicated it was deadlocked on child molestation charges, the trial court gave an instruction on “an entirely new phase of the case under new instruction which might fairly be construed as an expression of the court hostile to the defendant.” (*People v. Stouter, supra*, 142 Cal. at p. 150.)

In *Jennings*, the defendant was charged with assault with intent to commit murder. When the jury indicated it was deadlocked, the trial court instructed the jury on the offense of assault with a deadly weapon.

Lozano concedes this case does not involve instruction on a new offense. However, he argues that in his case, as in the cited cases, the trial court unfairly provided the jurors with an entirely new instruction that could be construed as an expression the trial court desired a verdict of guilty. Lozano claims the jury practically told the trial court that if the instructions were changed to permit a conviction of second degree murder based on Lozano’s act of handing the carving fork to Terrell after the fatal blow had been struck, the jurors would be able to return a verdict of guilty.

We disagree. The trial court did not instruct the jury on a new theory of culpability. Rather, the trial court merely clarified how the aider and abettor instruction previously given applied with respect to the timing of the fatal blow. Nothing in the supplemental instruction suggested the jury should find Lozano guilty of murder. Instead, the instruction stressed that the jury remained the exclusive judge of the facts and the trial court did not intend to express any view on the evidence.

Additionally, contrary to Lozano's assertion, the jury was not deadlocked. The jury's note stated it was not able to reach a unanimous verdict on one of the counts and asked, "What is the next step?" This indicates the jury remained open to further deliberations. Also, after the trial court took the three verdicts the jury had reached, it asked the jury whether the second question meant the jury was still "working" on the fourth count. Juror No. 1 answered affirmatively. Thereafter, defense counsel, the prosecutor and the trial court acted as though the jury continued to deliberate and the jury did continue to deliberate while the trial court and the parties discussed how to respond to the question. Finally, a jury cannot declare itself deadlocked. This is a finding the trial court makes if it concludes there is no reasonable probability the jury can agree. (Pen. Code, § 1140.)² The trial court made no such finding in this case.

In sum, Lozano fails to demonstrate any reversible error in the trial court's supplemental instruction.

2. Defense counsel did not request the opportunity to reopen argument.

Lozano contends the trial court should have provided defense counsel an opportunity to argue the new instruction. (*United States v. Gaskins* (9th Cir. 1988))

² Penal Code section 1140 provides: "[t]he jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict . . . unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

849 F.2d 454, 456-457.) Lozano notes the prosecutor's exclusive reliance on the felony-murder rule gave the defense no notice the jury might convict of second degree murder based on the act of handing the fork to Terrell.

Also, defense counsel mistakenly argued murder is deemed to have occurred when the fatal blow is struck. The new instruction undermined defense counsel's assertion on that issue. Thus, according to Lozano, it was essential the parties be permitted to present new argument to address the principles stated in the supplemental instruction. Lozano suggests defense counsel could have reminded the jury that Amaya's death had been caused by a knife wound and the act of handing the fork to Terrell was so inconsequential that it could not be considered an act of aiding and abetting the murder. Defense counsel also might have argued Lozano did not share Terrell's unlawful intent because it was unlikely Lozano believed the fork was capable of inflicting a lethal wound. The defense also could have argued death was a foregone conclusion after the stab wounds Terrell already had inflicted. Therefore, Lozano did not share Terrell's criminal intent when he handed him the fork. In sum, additional argument might have permitted defense counsel to dissuade the jury from convicting Lozano of Amaya's murder.

Lozano's contention fails. Lozano cannot complain he was not given an opportunity to argue the new instruction because, in the trial court, he resisted the prosecutor's suggestion that argument be reopened. Indeed, Lozano repeatedly opposed reopening argument. He cannot now argue the trial court erroneously refused him an opportunity to reopen argument.

Lozano concedes defense counsel objected to the reopening of argument. However he asserts these objections were made before the trial court indicated it intended to instruct on an unanticipated legal principle. He asserts that once the trial court announced it would give the supplemental instruction, defense counsel

did not oppose reopening argument. However, the prosecutor did not at that point request further argument.

Lozano also claims that because the trial court denied the prosecutor's request to present additional argument, a request by defense counsel would have been futile. We disagree. A fair reading of the record suggests that, had both parties asked to reopen argument, the trial court would have permitted it. However, defense counsel likely preferred to rely on the initial argument to the jury in which defense counsel was able to assert, falsely and without an objection from the People, that liability for aiding and abetting terminates when the fatal blow is struck. In fact, as *Celis* held and as the supplemental instruction informed the jury, aider and abettor liability may attach at any time before the victim dies. Thus, a reopening of argument clearly was not in Lozano's interests.

The proposed arguments that Lozano suggests defense counsel could have advanced in reopened argument only would have highlighted the fact Lozano aided and abetted Amaya's murder before her death. The other arguments suggested by Lozano, that the act of handing the fork to Terrell was inconsequential, the fork was not capable of inflicting a lethal wound and that death was a foregone conclusion after the knife wounds Terrell already had inflicted, all similarly would serve only to highlight weaknesses in the defense case. Clearly, a carving fork that was found protruding from Amaya's back was a potentially lethal weapon, the act of handing the fork to Terrell was not inconsequential and Amaya was alive when Lozano left the apartment.

Given this evidence and the content of the supplemental instruction, it is apparent that reopening of argument would have benefitted the prosecution substantially more than it would have benefitted the defense. Consequently, the trial court's denial of the People's request to reopen argument did not prejudice Lozano and defense counsel cannot be faulted for opposing the reopening of argument.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.